Supreme Court, U.S.
FILED

06-791 DEC - 4 2006

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

WHITE HAT MANAGEMENT, LLC,
Petitioner,

v.

BEVERLY BLOUNT-HILL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN B. SCHOMER
Counsel of Record
DONALD W. DAVIS, JR.
Brennan, Manna & Diamond LLC
75 East Market Street
Akron, OH 44308
(330) 253-5060

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Petitioner provides management services to community schools, also known as charter schools. Petitioner was denied intervention in the underlying litigation attacking the constitutionality of the Ohio Community Schools Act. The District Court denied Petitioner's motion to intervene on the basis that its interests were adequately represented. The Court of Appeals affirmed the judgment on different grounds, holding that economic interests are not sufficient to justify intervention as of right.

The question presented is as follows:

Whether an economic interest may be sufficient to support intervention as of right under Fed. R. Civ. P. 24(a)?

PARTIES

A list of the parties to the proceeding whose judgment is the subject of this petition is as follows:

Petitioner: White Hat Management, LLC.

Respondents: Board of Education of the State of Ohio; Department of Education of the State of Ohio; Susan Tave Zelman in her capacity as Ohio Superintendent of Public Instruction; Beverly Blount-Hill; Marcia D. Connors; and Willie A. Terrell, President, Dayton Education Association.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The parent company of White Hat Management, LLC is White Hat Ventures, LLC, which is not publicly traded.

The parent company of White Hat Ventures, LLC is Brennan Holdings, LLC, which is not publicly traded.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

A. Factual Background 3

B. Lower Court Proceedings 4

REASONS FOR GRANTING THE PETITION 6

I. THE RULING BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION . . . 6

A. The Ruling Below Conflicts With The Decisions Of Other Courts Of Appeals 6

B. The Circuit Conflict Concerns An Important Federal Question 12

II. THE COURT OF APPEALS ERRED IN REJECTING WHITE HAT'S RIGHT TO INTERVENE IN THE DISTRICT COURT PROCEEDING ATTACKING THE CONSTITUTIONALITY OF THE OHIO COMMUNITY SCHOOLS ACT 12

CONCLUSION 16

APPENDIX

Appendix A
Blount-Hill, et al. v. Board of Education of the State of Ohio, et al., Sixth Circuit Case No. 05-4354
(6th Cir. September 5, 2006) 1a

Appendix B
Decision and Entry Overruling Motion to Intervene of White Hat Management, LLC, Southern District of Ohio Case No. 3:04cv197
(S.D. OH September 26, 2005) 19a

Appendix C
Ohio Revised Code § 3314.08 . . . . . 28a

TABLE OF AUTHORITIES

CASES

Arakaki v. Cayetano,
324 F.3d 1078 (9th Cir. 2003) 7

Diamond v. Charles,
476 U.S. 54 (1986) 10

Janson v. City of Cincinnati,
904 F.3d 336 (6th Cir. 1990) 14

Kleissler v. United States Forest Serv.,
157 F.3d 964 (3d Cir. 1998) 14

Liberty Mut. Ins. Co. v. Treesdale, Inc.,
419 F.3d 216 (3d Cir. 2005) 6-7, 9, 11

Linton v. Comm. of Health and Environment of Tenn.,
973 F.2d 1311 (6th Cir. 1992) 14

McConnell v. FEC,
540 U.S. 93 (2003) 10

Michigan State v. Miller,
103 F.3d. 1240 (6th Cir. 1997) 5, 13

New York Public Interest Research Group, Inc. v. Regents of the University of N.Y.,
516 F.2d 350 (2d Cir. 1975) 6, 7

National Resources Defense Council, Inc. v. United States Nuclear Regulatory Com.,
578 F.2d 1341 (10th Cir. 1978) 8, 14

Providence Baptist Church v. Hillandale Comm., Ltd.,
425 F.3d 309 (6th Cir. 2005) 2

Purnell v. Akron,
925 F.2d 941 (6th Cir. 1991) 13

State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.,
___ Ohio St. 3d ___, 2006 Ohio 5512 (2006) 3

Trbovich v. United Mine Workers,
404 U.S. 528 (1972) 13

United States v. Alisal Water Corp.,
370 F.3d 915 (9th Cir. 2004) 6, 9, 13

United States v. Tennessee,
260 F.3d 587 (6th Cir. 2001) . . . . . *passim*

Utahns for Better Transp. v. U.S. DOT,
295 F.3d 1111 (10th Cir. 2002) 8

Utah Ass'n of Counties v. Clinton,
255 F.3d 1246 (10th Cir. 2001) 2

LESIGLATIVE MATERIAL

28 U.S.C. §1254 1

Ohio Revised Code § 3314.08 3

MISCELLANEOUS

7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1908 (Supp. 2002) 7

OPINIONS BELOW

The opinion of the Sixth Circuit is unreported and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-18a. The District Court's order overruling Petitioner's motion to intervene is unreported and reprinted at Pet. App. 19a-27a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 5, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Rule 24(a)(2) of the Federal Rules of Civil Procedure provides for intervention of right where "the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Chapter 3314 of the Ohio Revised Code, the Ohio Community Schools Act, provides for the creation of Ohio's community schools and permits them to use public funds to contract with private contractors. Pet. App. 28a-50a.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals affirmed, on alternate grounds, a decision of the United States District Court for the Southern District of Ohio denying Petitioner, White Hat Management, LLC ("White Hat" or "Petitioner"), intervention of right under Fed. R. Civ. P. 24(a). The Sixth Circuit subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right." *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005). Despite the latitude given intervenors in similar cases, the Sixth Circuit erroneously found that White Hat does not have a substantial interest determining that its interest is solely economic and does not concern the constitutional and statutory violations alleged in the litigation. The Sixth Circuit's decision departed from the well established standards interpreting Rule 24(a), and exacerbated the conflict between the Circuits.

This issue is of national importance because the Sixth Circuit's ruling has a stifling effect on a party's ability to protect its rights through intervention. If the Sixth Circuit's ruling is allowed to stand, the "broad latitude" used to determine "substantial interest" under Rule 24(a) will be extremely diminished and defeat the primary purpose of intervention—to dispose "of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1252 (10th Cir. 2001).

This litigation attacks White Hat's viability in Ohio. Understating and ignoring White Hat's interests, the Sixth Circuit denied White Hat Due Process to defend its very survival.

Factual Background. The Ohio Community Schools Act (the "Act") provides for the creation of community schools. Community schools, also referred to nationally as "charter schools," are innovative public schools offering dissatisfied parents and students a better, safer, and more efficient alternative to traditional public schools. Students struggling in traditional public schools can receive a second chance in community schools where they receive more individual attention and learn life skills. Previously, White Hat successfully intervened as a Defendant in two related State Court Actions. (*Pate v. State of Ohio Bd. of Educ.*, Franklin County Case No. 01-CVH-0504414 and *Ohio Federation of Teachers v. State of Ohio Bd. of Educ.*, Franklin County Case No. 01-CVH-05-4457). The second of these actions ultimately reached the Ohio Supreme Court where each of White Hat's propositions of law was accepted on review. *State ex rel. Ohio Cong. of Parents & Teachers v. State Bd. of Educ.* (2006), ___ Ohio St. 3d ___, 2006 Ohio 5512. Based on those propositions, the Ohio Supreme Court ultimately held that the Act did not violate the Ohio Constitution. *Id.*

Plaintiffs' Amended Complaint challenges the constitutionality of the Act under the Ohio and United States Constitutions. Plaintiffs seek to eliminate funding for all Ohio community schools.

White Hat is a professional education management firm headquartered in Akron, Ohio. White Hat contracts with community schools to provide operational services. State funds are the sole source of guaranteed funding for community schools. Ohio Revised Code § 3314.08(I) reprinted at Pet. App. 44a. If Ohio's community schools lose funding, White Hat will likewise lose its funding. Therefore, White Hat's viability is at risk.

Lower Court Proceedings. On June 9, 2004, Plaintiffs filed the underlying action in the United States District Court for the Southern District of Ohio Western Division asserting six (6) claims against the Ohio Board of Education, the Ohio Department of Education, and the Ohio Superintendent of Public Instruction. On October 1, 2004, White Hat filed a Motion to Intervene, arguing that if the Court granted the relief sought by the Plaintiffs, it would effectively end community schools in Ohio and, consequently, the solvency of White Hat's Ohio operations.

The District Court evaluated White Hat's claim for intervention under Rule 24(a) using a four part test: (1) timeliness of the application to intervene; (2) the applicant's substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) inadequate representation of that interest by parties already before the court. Pet. App. 20a-21a.

On September 26, 2005, the District Court denied White Hat's Motion to Intervene as a matter of right, holding that: (1) "White Hat's Motion to intervene was timely" (Pet. App. 21a); (2) White Hat's legal "interest is sufficient to satisfy this requirement" (Pet. App. 24a); (3) "As the Sixth Circuit has stated, the burden for [demonstrating impairment] is minimal, and White has satisfied its burden" (Pet. App. 24a); and (4) "While the burden [for demonstrating inadequate representation] is minimal, White Hat has offered nothing to satisfy that burden; consequently, it is not entitled to intervene as a matter of right." (Pet. App. 25a).

The District Court found that White Hat failed to demonstrate that the current Defendants will not adequately represent its interests. Interestingly, the District Court denied intervention despite the recognized rule stating that "it may be

enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Michigan State v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997).

On March 3, 2006, White Hat timely appealed. White Hat argued that the District Court erred when it held that White Hat did not establish the fourth element of the test for intervention as of right—namely adequacy of representation. On September 5, 2006, the Sixth Circuit affirmed the lower Court's decision on different grounds, holding that White Hat does not have a substantial legal interest for purposes of Rule 24(a). Pet. App. 2a. The Sixth Circuit majority did not address the issue of inadequate representation.

The Sixth Circuit acknowledged prior precedent that "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Michigan State*, 103 F.3d at 1247. Despite this recognition, the Sixth Circuit, relying on *United States v. Tennessee*, 260 F.3d 587 (6th Cir. 2001), erroneously held that White Hat's "claimed interest does not concern the constitutional and statutory violations alleged in the litigation but rather an interest in the economic component," and therefore denied intervention as a matter of right under Rule 24(a). Pet. App. 7a.

Sixth Circuit panel member, Justice Clay, noted in his concurring opinion that the majority's reliance on *Tennessee* was misplaced. Pet. App. 9a. Specifically, he opined that the Sixth Circuit's decision in *Tennessee* "did not purport to definitively resolve whether any economic interest could support intervention as of right." Pet. App. 10a. The portion of the *Tennessee* opinion addressing the sufficiency of the intervenor's interest is "dicta" as the court decided that the right to intervene was inappropriate on timeliness grounds.

Pet. App. 12a. Justice Clay, in distinguishing *Tennessee*, stated that "White Hat's economic interest directly concerns constitutional violations alleged by the Plaintiffs." Pet. App. 11a.

Justice Clay recognized the conflict among the Courts of Appeals, opining: "Not only is there no controlling case law in this Circuit, there is no clear consensus outside this Circuit on whether economic interest suffices to support intervention as a matter of right." Pet. App. 12a. Despite valid arguments for reversal, the Sixth Circuit erroneously affirmed the District Court's decision on the aforementioned grounds.

REASONS FOR GRANTING THE PETITION

This case presents an important question that needs to be settled by this Court, and on which the Circuits are in conflict: Is a non-party permitted to intervene as a matter of right if its interest is strictly economic in nature? The answer to this question will determine whether nonparties can intervene to protect their substantial economic interests.

I. THE RULING BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON AN IMPORTANT FEDERAL QUESTION.

A. The Ruling Below Conflicts With The Decisions Of Other Courts Of Appeals.

The Federal Circuits are split as to whether an economic interest can constitute a substantial interest for the purposes of Fed. R. Civ. P. 24(a)(2) intervention. *New York Public Interest Research Group, Inc. v. Regents of the University of N.Y.*, 516 F.2d 350 (2d Cir. 1975); *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004); *Liberty Mut. Ins.*

Co. v. Treesdale, Inc., 419 F.3d 216 (3d Cir. 2005); *United States v. Tennessee*, 260 F.3d 587 (6th Cir. 2001). The term "significantly protectable interest" has not been a term of art in the law, and sufficient room for disagreement exists over the meaning of the term. *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003) (citing 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1908, at 21 (Supp. 2002)).

In 1975, the Second Circuit analyzed the issue of whether a pharmaceutical society and pharmacists could intervene in an action brought by a consumer group to enjoin enforcement of a statewide regulation, which prohibited advertising the price of prescription drugs. *New York Public Interest Research Group, Inc.*, 516 F.2d at 351-52. The Second Circuit found that the pharmacists had an economic interest in preventing the advertising of drug prices because it would mislead the consumer as to where to find the lowest price, thus harming the pharmacists. *Id.* at 352. Further, allowing the advertisement of prescription drug prices would lead to significant changes in the profession and in the way the "pharmacists conduct their business." Protecting these economic interests "is one basis for sustaining the regulation." *Id.* Therefore, the Second Circuit held that the pharmacists had a sufficient interest to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). *Id.* Unlike the Sixth Circuit, the Second Circuit was not persuaded by the contention that the pharmacists could protect their interests by attacking a new regulation by some method other than intervention. *Id.* "Such contention ignores the possible *stare decisis* effect of an adverse decision." *Id.*

Almost three decades after *New York Public Interest Research Group, Inc.*, the Tenth Circuit addressed the issue of what type of interest is required by Rule 24(a)(2). In

Utahns for Better Transp. v. U.S. DOT, 295 F.3d 1111, (10th Cir. 2002), the Tenth Circuit reversed an order of a District Court and allowed a trade organization, ASET, to intervene in an action brought by the Sierra Club against the United States Department of Transportation and other agencies and officials of the United States. ASET's members had existing contracts and pending bids for approved transportation projects specifically attacked in the lawsuit. *Id.* at 1113. Further, ASET argued that its members had economic opportunities, including future contract awards and bid opportunities, at stake. *Id.*

In overruling the lower Court, the Tenth Circuit stated that the "threat of economic injury from the outcome of litigation undoubtedly gives a petitioner the requisite interest." *Id.* at 1115. The grounds set forth by ASET supporting intervention were specifically economic in nature and therefore, they not only had the right to intervene but, their inclusion was considered beneficial to the outcome of the case. *Id.* at 1116.

The Court in *Utahns* relied heavily upon *National Resources Defense Council, Inc. v. United States Nuclear Regulatory Com.*, 578 F.2d 1341 (10th Cir. 1978). Here the potential recipients of licenses for the operation of uranium mills in New Mexico sought to intervene in an action by environmentalists to prohibit government agencies from issuing licenses without first preparing environmental impact statements. *National Resources Defense Council, Inc.*, 578 F.2d at 1346. Once again, the Court held that the outcome of the litigation could have profound economic effect on the would-be intervenors, thus giving them a substantial interest within the meaning of Rule 24(a)(2). *Id.* The Court went on to state that "there is some value in having the parties before the court so that they will be bound by the result. American

Mining Congress represents a number of companies having a wide variety of interests. This can, therefore, provide a useful supplement to the defense of the case." *Id.*

The Ninth Circuit decided the issue of whether a development company who won a judgment against a utility company could intervene in an action to require the sale of the utility company's property. *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004). The development company claimed an economic interest in the action because the sale would have created many complexities regarding the priority of creditors. *Id.* Although the development company was not permitted to intervene because its interest was "several degrees removed from the overriding public health and environmental policies that are the backbone of this litigation," the Court held that an economic interest would be sufficient if concrete and related to the subject matter of the action. *Id.* at 920. Unlike the potential intervenor in *Alisal,* White Hat's relationship to the subject matter of the current action is such that should the Plaintiffs prevail, White Hat's business in Ohio will be extinguished. Therefore, it is likely that under the Ninth Circuit's standard, White Hat would be permitted to intervene.

The Third Circuit took a conflicting approach in analyzing the issue of whether persons harmed by products containing asbestos could intervene in an action between the manufacturer of the products and their insurer where the insurer was claiming that it had paid out policy limits. *Liberty Mutual Insurance Company Inc. v. Treesdale, Inc.*, 419 F.3d 216 (3d Cir. 2005). The persons harmed had an economic interest in the action because they believed the manufacturer to be insolvent, thus presenting a substantial challenge to recovery if not permitted to intervene. *Id.* at 219. These persons were not permitted to intervene because they

did not have a right to the specific fund at issue. *Id.* at 223. The Court held that a "mere economic interest" in the outcome of litigation is insufficient to intervene. *Id.* at 220. The implications of this holding would limit intervention to situations where the would-be intervenor meets the full standing requirements of Article III. This Court already declined to adopt such a proposition. See, *Diamond v. Charles*, 476 U.S. 54, 69 n. 21 (1986) ("The precise relationship between the interest required to satisfy [Fed. R. Civ. P. 24(a)] and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals."); *McConnell v. FEC*, 540 U.S. 93, 223 (2003).

The Sixth Circuit's holding likewise conflicts with Second, Ninth, and Tenth Circuit precedent. In deciding the present matter, the Sixth Circuit relied heavily upon *United States v. Tennessee*, 260 F.3d 587, (6th Cir. 2001). In *Tennessee*, the Court analyzed the issue of whether CMRA, a company providing services for developmentally disabled children, could intervene in an action that could reduce the amount of state funding that it would receive. *Tennessee*, 260 F.3d 587 (6th Cir. 2001). The Sixth Circuit accordingly held that the CMRA had an "interest in the economic component" of the outcome which did not justify intervention. *Id.* at 595. The Court stated that CMRA's interest could be protected by contract and lobbying efforts. *Id.* at 595-96.

In sum, the Sixth Circuit's decision in the present matter sharply conflicts with decisions by the Second, Ninth, and Tenth Circuits. The Sixth Circuit denied intervention on the basis that the interest was economic. Pet. App. 7a. (denying intervention because their interest was "an interest in the economic component"). This greatly differs from the Second, Ninth and Tenth Circuits. The Ninth Circuit determined that an economic interest is sufficient to permit intervention as a

matter of right if concrete and related to the subject matter of the action. See, pp. 9-10 *supra*. Even more broadly, the Second and Tenth Circuits analyzed the economic effect on the potential intervenor in determining that intervention was permissible. See, pp. 7-9 *supra*.

Alternatively, the Third Circuit held that an intervenor's "mere economic interest" was not sufficient to permit intervention. *Liberty Mut. Ins. Co.*, 419 F.3d 216, 221. The Third Circuit appears to allow some latitude for intervention when the interest is economic. However, the Sixth Circuit's decision below will not allow intervention in any circumstance when the interest is economic in nature.

The Sixth Circuit decision purports to create a bright-line rule, that economic interests can never provide for the right of intervention under Rule 24(a)(2). Pet. App. 7a. This also differs from its prior holding in *Tennessee*, where the court stated that the economic interest in the case did not reach the "level of requisite substantial interest required to intervene". *Tennessee*, 260 F.3d 587, 595. Even the *Tennessee* court suggested that an economic interest, when substantial, can be a basis of intervention. The decision below effectively eliminates a court's ability to review any matter of intervention when economics is the sole interest of the potential intervenor.

For the foregoing reasons, the decision below conflicts with the decisions of other Courts of Appeals and is grounds for issuance of the writ under Supreme Ct. R. 10(a).

B. The Circuit Conflict Concerns An Important Federal Question.

Denying intervention because an interest is economic in nature has consequences. It thwarts all non-parties with significant economic interests from intervening as a matter of right, effectively denying Due Process in protecting economic interests. The interests of a non-party transacting business in a commercial context are most always strictly economic. This holding sharply conflicts with the intent of Fed. R. Civ. P. 24(a). This Court should review and reverse the decision below to allow non-parties to intervene as a matter of right where they have substantial economic interests.

II. THE COURT OF APPEALS ERRED IN REJECTING WHITE HAT'S RIGHT TO INTERVENE IN THE DISTRICT COURT PROCEEDING ATTACKING THE CONSTITUTIONALITY OF THE OHIO COMMUNITY SCHOOLS ACT.

Plaintiffs initiated an action to determine whether the Act is constitutional. White Hat operates numerous community schools in Ohio pursuant to contracts entered into directly with the community schools. If the Act is deemed unconstitutional, White Hat's business would not just be impaired, it would be extinguished in Ohio. Therefore, White Hat's interest is substantial as required by Rule 24(a).

The Sixth Circuit incorrectly decided the outcome in the instant matter in a cursory, unreported opinion. Its holding conflicts with decisions in the various Circuits cited above. Specifically, intervention is permitted when the non-party's economic interests are substantial. See, pp. 7-10 *supra*. The standard for a sufficient interest under Rule 24(a) is more lenient than that required to have standing to initiate a lawsuit.

Purnell v. Akron, 925 F.2d 941, 948 (6th Cir. 1991); *Trbovich v. United Mine Workers*, 404 U.S. 528, 536 (1972). Furthermore, because the interests are to be construed expansively, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Michigan State v. Miller*, 103 F.3d. 1240, 1247 (6th Cir. 1997). Therefore, the Sixth Circuit was incorrect in finding that an economic interest is never sufficient to intervene under Rule 24(a). The broader interpretation espoused by the Second, Ninth and Tenth Circuits is consistent with the more generally accepted reading of the rule.

White Hat does not contend that every economic interest is sufficient to warrant intervention as of right. As the Ninth Circuit indicated in *Alisal*:

> [a] mere interest in property that may be impacted by litigation is not a passport to participate in the litigation itself. To hold otherwise would create a slippery slope where anyone with an interest in the property of a party to a lawsuit could bootstrap that stake into an interest in the litigation itself.

Alisal, 370 F.3d 915, 920. However, as also pointed out by the Court in *Alisal,* an economic interest is sufficient if it is concrete and related to the subject matter of the action. *Id.* There can be no question that White Hat's interests are substantial because its very survival in Ohio depends on the outcome of the underlying litigation. White Hat's business model of providing educational choices for children and parents could likewise be eliminated.

As Justice Clay outlined in his concurrence, the Sixth Circuit's reliance on *Tennessee* is misplaced. Pet. App. 9a. In *Tennessee*, the settlement agreement would have limited

the amount of funds available for Tennessee to fund the non-profit petitioners. However, there was no "danger of prohibiting Tennessee from fulfilling its legal obligations to CRMA." Pet. App. 11a. Here, the state funding source for community schools will be eliminated, not simply limited, if the Act is found to be unconstitutional. No other guaranteed funding sources exist. Further, if the Act is determined to be unconstitutional, no amount of lobbying will protect White Hat's interests. The difference is clear.

Additionally, in *Kleissler v. United States Forest Serv.*, the Third Circuit specifically recognized that intervention is justified when existing contract rights are threatened. *Kleissler v. United States Forest Serv.*, 157 F.3d 964, 968 (3d Cir. 1998). The Third Circuit held that "timber companies have direct and substantial interests in a lawsuit aimed at halting logging or, at a minimum, reducing the efficiency of their timber-cutting." *Id.* at 972. Similarly, White Hat, a community school management company, has direct and substantial interests in this lawsuit that is aimed at eliminating community schools in Ohio. White Hat's sole purpose is to assist community schools in providing a quality alternative to traditional public schools. Similar to other intervenors with substantial economic interests, White Hat's involvement can "provide a useful supplement to the defense of the case." *National Resources Defense Council, Inc.*, 578 F.2d at 1346.

Furthermore, a potential *stare decisis* effect has been found sufficient to provide an interest for the purposes of Rule 24 intervention. See *Linton v. Comm. of Health and Environment of Tenn.*, 973 F.2d 1311 (6th Cir. 1992); *Janson v. City of Cincinnati*, 904 F.3d 336 (6th Cir. 1990).

White Hat meets all other requirements to intervene pursuant to Fed. R. Civ. P. 24(a): (1) its motion was timely filed; (2) its ability to protect its interest is impaired in the absence of intervention; and (3) the parties already before the Court inadequately represent its interest, which the Sixth Circuit majority failed to address.

In summary, White Hat is entitled to intervene as a matter of right in a constitutional contest which could extinguish its business in Ohio. This Court should grant the petition to ensure that the substantial economic interests of White Hat and those similarly situated in a nationwide context are protected. In doing so, the Court will preserve the rights of those with substantial economic interests to have grievances fully heard by the courts of the United States. More importantly, neither the Supreme Court nor the lower courts have explained what constitutes a substantial legal interest under Rule 24(a). Only this Court can unify the application of the Federal Rules of Civil Procedure and eliminate a conflict that has resulted from contradictory holdings. Further, only this Court can ensure that Due Process be afforded non-parties when their economic rights are threatened by litigation in which the litigants seek to silence and destroy nonparties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN B. SCHOMER
Counsel of Record
DONALD W. DAVIS, JR.
Brennan, Manna & Diamond LLC
75 East Market St.
Akron, OH 44308
(330) 253-5060

Counsel for Petitioner

December 4, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-4354

[Filed September 5, 2006]

BEVERLY BLOUNT-HILL, MARCIA D. CONNORS, and WILLIE A. TERRELL, JR., President, Dayton Education Association,
Plaintiffs-Appellees

v.

BOARD OF EDUCATION OF THE STATE OF OHIO, DEPARTMENT OF EDUCATION OF THE STATE OF OHIO, and SUSAN TAVE ZELMAN, Defendants; WHITE HAT MANAGEMENT, LLC,
Defendant-Appellant

BEFORE: MOORE, CLAY, and GRIFFIN, Circuit Judges.

OPINION

GRIFFIN, Circuit Judge.

Appellant White Hat Management, LLC ("White Hat") appeals the district court's denial of its petition to intervene in

the underlying action as a matter of right pursuant to Federal Rule of Civil Procedure 24(a) and as a matter of discretion pursuant to Federal Rule of Civil Procedure 24(b). Specifically, White Hat contends that, as a community school management company, it has a substantial right to intervene in litigation alleging that the funding provisions of the Community Schools Act, O.R.C. § 3314.01 (the "Act"), violate both the state and federal constitutions.

Although we base our holding on different grounds than the district court, we nevertheless affirm.

I.

The facts of this case are undisputed. In June 2004, the original plaintiffs, education association members or parents of school-aged children in Ohio, filed a complaint purporting to represent Ohio taxpayers against the Ohio Department of Education, the Ohio Board of Education, and the Ohio Superintendent of Public Instruction, Susan Tave Zelman, ("defendants") alleging that the Act violates both the Ohio and the federal constitutions. In short, plaintiffs seek declaratory and injunctive relief, contending that Ohio's funding statute for community schools-alternatives to traditional public schools-violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.[1] Defendants filed their answer in July 2004. White Hat petitioned the court to intervene as a defendant in October 2004.

---

[1] Plaintiffs also allege that the Act violated guarantees of Ohio's constitution. These claims are pending in state court and need not be addressed here.

White Hat is a professional education management firm with headquarters in Akron, Ohio. White Hat does not operate a community school, but its enterprise involves contracting with community schools to provide services in aid of the community schools' operation. The complaint at issue does not directly challenge any of the contracts to which White Hat is a party. Instead, the complaint challenges the constitutionality of the Act that funds the community schools. These community schools, in turn, contract with service providers such as White Hat.

Thus, White Hat's primary motivation for seeking intervention is concededly economic: because "[s]tate funds are the sole source of funding for community schools . . . [i]f [s]tate funds are taken away from community schools, they will be forced to close." Nevertheless, White Hat contends that it also has an interest in fulfilling its "mission" -- to provide an alternative education option for Ohio students.

The district court denied White Hat's petition to intervene on September 26, 2005, both as a matter of right and of discretion. White Hat timely appealed.

II.

Except as to issues of timeliness, which are not present in this case, we review de novo a district court's denial of a motion to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. *Stupak-Thrall v. Glickman,* 226 F.3d 467, 471 (6th Cir. 2000)(citations omitted).

Federal Rule of Procedure 24(a) provides that a non-party may intervene in litigation as of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that

the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." FED. R. Civ. P. 24(a)(2). We have construed Rule 24(a) to require a party attempting to intervene to establish: "'(1) timeliness of the application to intervene, (2) the applicant's substantial legal interest in the case, (3) impairment of the applicant's ability to protect that interest in the absence of intervention, and (4) inadequate representation of that interest by parties already before the court.'" *Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005)(quoting *Michigan State AFL-CIO v. Miller,* 103 F.3d 1240, 1245 (6th Cir. 1997)).

The district court properly cited the four-part test governing a potential party's right to intervene in pending litigation. In its application of the test, the district court ruled that: (1) the motion to intervene was timely; (2) White Hat satisfied the liberal inquiry that it had a substantial interest in the matter; (3) White Hat satisfied the minimal burden demonstrating that an impairment of its substantial legal interest was possible if intervention was denied; and (4) nevertheless, White Hat failed to demonstrate that the existing defendants would not adequately represent its interests. Accordingly, the district court denied White Hat's petition. On appeal, White Hat contends that the district court correctly held that White Hat satisfied the timeliness, substantial interest, and impairment requirements, but argues that it erroneously held that White Hat did not satisfy the minimal burden concerning the inadequacy of the present representation. We disagree. Specifically, we conclude that, pursuant to *United States v. Tennessee,* 260 F.3d 587 (6th Cir. 2001), White Hat lacks a substantial legal interest in the litigation for purposes of Rule 24(a).

As the district court noted, the Sixth Circuit subscribes to "a rather expansive notion of the interest sufficient to invoke intervention of right." *Providence Baptist Church,* 425 F.3d at 315 (citations omitted); *see also Purnell v. City of Akron,* 925 F.2d 941, 948 (6th Cir. 1991); *Bradley v. Milliken,* 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed liberally.") Notably, "an intervenor need not have the same standing necessary to initiate a lawsuit in order to intervene in an existing district court suit where the plaintiff has standing." *Providence Baptist Church,* 425 F.3d at 315 (citing *Assoc. Builders & Contractors v. Perry,* 16 F.3d 688, 690 (6th Cir. 1994)).

We undoubtedly construe Rule 24 "interests" expansively and have stated that "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Miller,* 103 F.3d at 1247. Although White Hat urges us to conclude that such a close case exists here, we are unpersuaded. Instead, we view this case as comparable to *United States v. Tennessee.* In *Tennessee,* a non-profit contract service provider ("CMRA") for developmentally disabled persons sought to intervene in a constitutional and statutory action challenging the state's treatment of developmentally disabled persons for purposes of participating in settlement agreements. *Tennessee,* 260 F.3d 587. First, CMRA asserted an "economic interest in assuring adequate funding for implementation of the settlement agreements and its contractual rights in agreements with the State to provide community-based services." *Id.* at 596. Second, the service provider alleged an interest in a specific provision of the contested law. *Id.* In assessing whether these interests were sufficient, we reasoned:

> The parties to these lawsuits have entered into consent decrees aimed at guaranteeing that Tennessee provide

> at least the minimum level of care to developmentally disabled individuals required by federal law. CMRA does not challenge the terms of these agreements or contend that they fall below what federal law requires. *CMRA is only concerned with the level of funding provided by the State to community-based service providers.* CMRA's claimed interest does not concern the constitutional and statutory violations alleged in the litigation, but rather how much its members get paid for providing services. *CMRA has an interest in the economic component of the settlement but the consent decrees obligate the State, not CMRA, to fund community services adequately.* By the terms of the settlement agreements, it is the responsibility of the State of Tennessee to provide adequate and appropriate community services to members of the plaintiff class. Implementation of the settlement agreement does not alter CMRA's economic interests with the State to provide support and services to the class members nor its ability to negotiate the terms of these contracts. Further, as found by both district court judges, CMRA can protect its economic interests in contract negotiations with the State by lobbying the legislative and executive branches for favorable funding arrangements, and in state courts by suing to enforce its contractual rights.

Id. at 595-96 (emphasis added). Accordingly, we held that "CMRA's economic interest and its interest in the lock-in provision do not reach the level of requisite substantial interest required to intervene." *Id.* at 596.

White Hat attempts to distinguish *Tennessee,* alleging that its holding was based largely on the fact that CMRA waited too long to enter the litigation and that CMRA's motivation

was to protect its participation in "future remedial proceedings." Further, White Hat alleges that it is motivated by both economic interests *and* for reasons relating to the preservation of this educational alternative. Nevertheless, we conclude that the Tennessee holding with respect to whether a "substantial legal interest" exists is controlling. Like CMRA, White Hat's primary interest is economic. It is not a party to any challenged contract nor is it directly targeted by plaintiffs' complaint. Instead, White Hat seeks to preserve the constitutionality of the community school's funding structure so that it might continue to contract with community schools. Similar to CMRA, White Hat's "claimed interest does not concern the constitutional and statutory violations alleged in the litigation," but rather "an interest in the economic component." *Tennessee,* 260 F.3d at 596. We conclude that this interest is insufficient to comprise a substantial legal interest for purposes of Rule 24(a) intervention. Like the proposed intervener in *Tennessee,* White Hat "can protect its economic interests in contract negotiations with the State by lobbying the legislative and executive branches for favorable funding arrangements. . . ." *Id.* at 596-97.

Accordingly, we hold that White Hat does not have a substantial legal interest for purposes of Rule 24(a) intervention, and, therefore, we affirm the district court's denial of White Hat's petition to intervene on this basis. *See Hoge v. Honda of America Mfg., Inc.,* 384 F.3d 238, 243 (6th Cir. 2004)("[W]e may affirm a decision of the district court if correct for any reason, including one not considered below.")(internal quotation and citation omitted).

III.

Alternatively, White Hat appeals the district court's denial of its petition for permissive intervention. Federal Rule of

Civil Procedure 24 likewise sets forth the standard for permissive intervention:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. Civ. P. 24(b).

"So long as the motion for intervention is timely and there is at least one common question of law or fact, the balancing of undue delay, prejudice to the original parties, and any other relevant factors is reviewed for an abuse of discretion." *Miller,* 103 F.3d at 1248 (citing *Purnell,* 925 F.2d at 950-51.)

In denying White Hat's petition for permissive intervention, the district court relied upon "undue and unnecessary delay" as justification for the denial. Specifically, the district court concluded that "[w]hile White Hat's perspective is different from that of the Defendants, it has offered nothing to indicate that its contribution will add anything of unique value. . . . Allowing it to intervene would result only in the duplication of the efforts of the existing Defendants and undue delay of the litigation."

Although White Hat contends that there is insufficient evidence to support this conclusion, this likelihood of duplication is more obvious when viewed in light of White Hat's proposed answer to plaintiffs' complaint. There, White Hat attempts to argue that plaintiffs have not raised every necessary and indispensable party, which, according to

plaintiffs, indicates that White Hat is requesting the joinder of "every community school, proposed community school, and management company . . . a finding [that] would raise the number of defendants to well over two hundred." In short, the district court had evidence before it, and was persuaded, that White Hat's presence in the litigation "would result only in the duplication of the efforts of the existing Defendants and undue delay of the litigation." We conclude that the district court's resolution of this issue was not an abuse of its discretion. Accordingly, we affirm.

IV.

For the foregoing reasons, we affirm the order of the district court.

CLAY, Circuit Judge, concurring in the judgment. Although I agree with the majority's decision to affirm the order of the district court, I would do so because White Hat has not offered any reason to support its contention that the State of Ohio may fail to adequately represent its interests in the instant litigation and not because White Hat's economic interest is insufficient to support intervention as of right. Whether White Hat's economic interest is sufficient to support intervention as of right is not controlled by this Court's decision in *United States v. Tennessee,* 260 F.3d 587 (6th Cir. 2001), and constitutes a complex question of first impression in this Circuit. Consequently, I believe the issue would be more properly treated in a thorough, published opinion, after extensive briefing. Inasmuch as this case can be easily resolved on the ground that White Hat has failed to show that the State of Ohio may not adequately represent its interest in the instant litigation, there is no need to address the sufficiency of White Hat's economic interest.

I.

This Circuit has not definitively resolved whether an economic interest can ever suffice to support intervention as of right. On the one hand, we have repeatedly stated that an applicant need not have a "legally enforceable right" to a specific outcome in the litigation in order to have a "substantial legal interest" in the subject matter of the litigation. *Grutter,* 188 F.3d at 399 (citing *Miller,* 103 F.3d at 1245 and *Purnell,* 925 F.2d at 948); *see also Tennessee,* 260 F.3d at 595. Thus, presumably a sufficiently substantial economic interest could support intervention as of right. On the other hand, in *United States v. Tennessee,* 260 F.3d 587 (6th Cir. 2001), we rejected a non-profit's economic interest in contracting with the State of Tennessee as sufficient to support intervention as of right.

In rejecting the particular applicant's economic interest in *Tennessee,* 260 F.3d 587 (6th Cir. 2001), however, we did not purport to definitively resolve whether any economic interest could support intervention as of right. Instead, we held that an economic interest *unrelated to the alleged statutory and constitutional violations* could not support intervention as of right. *Id.* at 595. In *Tennessee,* the United States filed suit to enforce the Civil Rights of Institutionalized Persons Act, 42 U.S.C. §§ 1997-1997jj, and the Fourteenth Amendment of the United States Constitution. *United States v. Tennessee,* 925 F. Supp. 1292, 1296 (W.D. Tenn. 1995). After a trial at which it was established that Tennessee had violated federal law, the district court imposed a remedial plan on Tennessee. *Id.* at 1297. CMRA, an association of non-profit agencies that provide services to the mentally disabled, applied to intervene, alleging that because its members contracted with the Tennessee to provide services to the mentally disabled, it had a financial interest in the

resolution of Tennessee's violations. *Tennessee,* 260 F.3d at 595. It appears that CMRA was essentially alleging that Tennessee's implementation of the remedial plan would drain its financial resources, potentially causing Tennessee to pay CMRA less for its services. This Court rejected CMRA's argument, explaining that CMRA's interest in funding "did not concern the constitutional and statutory violations alleged in the litigation, but rather how much its members get paid for providing services." *Id.*

Because *Tennessee* did not definitively resolve whether an economic interest could ever suffice to support intervention as of right, it does not control the outcome of this case. In contrast to the interest of the applicant in *Tennessee,* White Hat's economic interest directly concerns the constitutional violations alleged by Plaintiffs. Plaintiffs allege that the funding provisions of institutions with which White Hat contracts are unconstitutional. If Plaintiffs prevail, Ohio, and hence the community schools, will be legally prohibited from expending state resources to fulfill the community schools' contract obligations with White Hat unless and until Ohio devises a constitutional funding scheme. This differs significantly from *Tennessee,* where the lawsuit might have left Tennessee with less money to pay CMRA, but certainly not in danger of prohibiting Tennessee from fulfilling its legal obligations to CMRA.

Even if *Tennessee* could be interpreted to hold that an economic interest never suffices to support intervention as of right, however, it would not control the outcome of the instant case. Importantly, the portion of the *Tennessee* opinion addressing the sufficiency of the intervenor's interest is dicta. Before reaching the sufficiency of CMRA's interest, the *Tennessee* court had already held that CMRA was not entitled to intervention on timeliness grounds. Thus, the court's

discussion of whether CMRA's economic interest was sufficient to support intervention was unnecessary to the disposition of the case. *Id.* at 595; *see also Black's Law Dictionary* 454 (6th ed. 1990)(defining dicta as "Opinions of a judge which do not embody the resolution or determination of the specific case before the Court").

Not only is there no controlling case law in this Circuit, there is no clear consensus outside this Circuit on whether an economic interest suffices to support intervention as a matter of right. *See* Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure* § 1908, 263 (2d. ed. 1986)("There is not as yet any clear definition, either from the Supreme Court or from the lower courts, of the nature of the 'interest relating to the property or transaction which is the subject of action. . . .'") At least two Circuits have held that an economic interest may be sufficient to support intervention as of right. *New York Pub. Interest Research Group, Inc. v. Regents of the University of the State of New York,* 516 F.2d 350, 352 (2d Cir. 1975) (per curiam); *United States v. Alisal Water Corp.,* 370 F.3d 915, 919-20 (9th Cir. 2004)(holding that an economic interest supports intervention as of right where it is concrete and related to the subject matter of the litigation). There is, however, authority to the contrary. *See Liberty Mut. Ins. Co.v. Treesdale, Inc.,* 419 F.3d 216, 221 (3d Cir. 2005). Consequently, I do not believe that we should attempt to resolve this issue in a perfunctory manner in an unpublished opinion.

II.

Inadequate Representation

Nonetheless, I would also affirm the order of the district court. I would do so, however, for the reason given by the

district court: White Hat has failed to establish that the State of Ohio may not adequately represent its interests. This Court entertains a presumption that the defendant will adequately represent an applicant's interests and the applicant bears the burden of overcoming this presumption. *Bradley v. Milliken,* 828 F.2d 1186, 1192 (6th Cir. 1987). To overcome the presumption of adequacy, "the [applicant is] not required to show that the representation will in fact be inadequate" but only "that the existing defendant . . . *may* not adequately represent [his or her] interests." . . *Grutter,* 188 F.3d at 400 (internal citations omitted) (emphasis added). This Court has found that an applicant presents a sufficient probability of inadequate representation where: (1) the defendant has an incentive to disregard possible defenses that the applicant would like to present, *id.* at 400; or (2) there is some evidence that the defendant will choose not to appeal an adverse ruling, *Miller,* 103 F.3d at 1248. In contrast, this Court has stated that an applicant fails to show a sufficient potential for inadequate representation where there is no evidence that (1) the defendant colluded with an opposing party, (2) the defendant and the applicant may have divergent interests in the litigation, or (3) the defendant actually failed to fulfill his duty to represent. *Bradley,* 828 F.2d at 1192.

In this case, White Hat has failed to meet its burden to show that the State of Ohio may fail to adequately represent White Hat's interests. White Hat has not pointed to any failure by Ohio to represent White Hat's interests in the instant suit nor articulated any possible future scenario in which its interests diverge from the State of Ohio. White Hat presents two theories under which it claims that its interests may diverge from the State of Ohio, both equally unpersuasive. First, White Hat argues that its interests may diverge from Ohio's interests because Ohio represents all community schools whereas White Hat only represents

schools with which it contracts. Second, White Hat argues that its interests may diverge from Ohio's because Ohio's role is that of a regulator of the OCSA and White Hat's role is of one regulated by the OCSA.

While these arguments could carry force in a different context, they are unpersuasive as applied to the facts of this case. White Hat's first argument is unpersuasive because the interests of the individual community schools do not, and will not, differ in this litigation. The OCSA's funding scheme is either unconstitutional as applied to all of the schools or none of the schools. Thus, the school's interests and potential defenses are necessarily identical in the instant litigation. Consequently, there is no reason to believe White Hat's interests may diverge from Ohio's simply because its interests relate only to specific schools.

White Hat's second argument -- that its interests may diverge from Ohio's interests because is a regulated entity while Ohio is a regulator -- is equally unpersuasive. White Hat seems to argue both that (1) its status as a regulated entity means that it may have a different interest in the remedying the funding situation should the OCSA be declared unconstitutional and that (2) the mere fact that it is a regulated entity and Ohio is a regulator is grounds for assuming inadequate representation. First, White Hat may very well have different interests in remedying the funding situation should the OCSA be declared unconstitutional. However, this possible future divergence of interests does not bear on White Hat's or Defendant's interests in the instant case. A new funding scheme may only be enacted by the Ohio legislature. *De Rolph v. State,* 78 Ohio St. 3d 193, 1997 Ohio 84, 677 N.E.2d 733, 747 n.9 (Ohio 1997)(declaring unconstitutional, but refusing to remedy, school funding legislation because such legislation is the province of the legislature). Neither the

district court nor any party to this litigation has the power to devise a new funding scheme on its own. *Cf. Stupak-Thrall v. Glickman,* 226 F.3d 467, 482 (6th Cir. 2000)(Moore, Circuit Judge, dissenting)(arguing that applicant's, Wilderness Association, interests would not be adequately represented in settlement negotiations by the federal government, who had the authority to devise remedy in settlement). Accordingly, White Hat's participation in this suit is unnecessary to protect its interest in a new funding scheme if the OCSA's current scheme is declared unconstitutional. To protect this interest, White Hat should lobby the Ohio legislature.

Next, the mere fact that White Hat is a regulated entity and Ohio is a regulator is not grounds for assuming that White Hat's interests will diverge from Ohio's, and thus, that Ohio may not adequately represent White Hat. To accept this argument would render both the presumption of adequate representation established *Bradley,* 828 F.2d at 1992, and the language of Rule 24 permitting intervention as of right only when the defendant is unable to adequately represent the applicant's interests meaningless. Courts in this Circuit would be required to grant intervention whenever a private party with a sufficient interest attempted to intervene in litigation against a state. Moreover, the cases in this Circuit have generally required something more than mere differing relationship to the subject matter of the litigation. For example, in *Grutter* this Court held that minority students may not be adequately represented by the University of Michigan in a suit challenging the University's affirmative action admissions policy because the students articulated a *concrete* situation in which their interests diverged from the University. 188 F.3d at 400-01. Specifically, the students contended that Michigan might hesitate to present evidence of its own past discrimination in order to justify its affirmative action program. *Id.* at 401. Because no entity is eager to present

evidence of its own misdeeds, the students' theory was believable. *See id.*

Similarly, in *Jansen v. City of Cincinnati,* 904 F.2d 336, 343 (6th Cir. 1990), the applicants presented evidence that the defendant would not rely on a specific affirmative defense that the applicants believed was warranted. In *Jansen,* several white firefighters and persons seeking firefighter positions sued the City of Cincinnati, challenging a consent decree from a previous lawsuit, which required Cincinnati to establish an affirmative action hiring/promotion system for Cincinnati's fire department. *Id.* at 338. The plaintiffs from the previous lawsuit, African-American firefighters, attempted to intervene to protect their interests in the remedies established by the consent decree. *Id.* at 338-39. The applicants offered arguments in support of Cincinnati's interpretation of the consent decree that the City had failed to raise in its answer to the complaint. *Id.* at 343. Specifically, the applicants cited paragraph 25 of the consent decree, which was not cited by the City, as a basis for the City's behavior. *Id.* Thus, this Court determined that the applicants had demonstrated a sufficient probability of inadequate representation.

Yet again, in *Miller,* this Court held that an applicant, the Michigan Chamber of Commerce ("MCC"), had demonstrated a sufficient possibility that the State of Michigan might not adequately represent its interests. 103 F.3d at 1247-48. The MCC applied to intervene in a suit by labor unions, challenging to Michigan's campaign finance law. *Id.* at 1243. This Court held that MCC had met its burden both because its role differed from Michigan's role (regulator v. regulated) and because there was evidence that Michigan had already failed to represent the MCC's interests. *Id.* at 1247-48. Specifically, Michigan had already failed to appeal a preliminary injunction, which while potentially in the interest

of Michigan, was not in the interest of the MCC. *Id.* at 1248. In light of Michigan's failure to appeal the preliminary injunction, the Court determined that the MCC's status as a regulatee created interests in the litigation that the State of Michigan, as a regulator, would not adequately represent. *Id.*

In contrast, in the *United States v. Michigan,* 424 F.3d 438, 444 (6th Cir. 2005), this Court found that an applicant had not met its burden of showing a potential for inadequate representation. It explained:

> The relief requested by the proposed intervenors and the State of Michigan in their respective pleadings is nearly identical in that they both seek a declaration that the Tribes do not retain any off-reservation usufructuary rights under the Treaty. The proposed intervenors *have not identified any separate arguments unique to them* that they would like to make concerning the existence of the Tribes' inland rights, *nor have they shown that the State of Michigan would fail to present such arguments* to the district court.

Id (emphasis added). The panel's reasoning indicates that an applicant has the burden to, at a minimum, articulate a potential scenario in which its interests may diverge from the defendant's interests. Inasmuch as White Hat has failed to articulate any scenario in which its interests may diverge from Ohio's interests, I would hold that White Hat failed to establish inadequate representation.

III.

Conclusion

For the reasons set forth above, I would affirm the order of the district court denying White Hat's application to intervene.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Case No. 3:04cv197

[Filed September 26, 2005]

BEVERLY BLOUNT-HILL, et al.,)
Plaintiffs,)
)
vs.)
)
STATE OF OHIO, et al.,)
Defendants.)
)

DECISION AND ENTRY OVERRULING MOTION TO INTERVENE OF WHITE HAT MANAGEMENT, LLC (DOC. #9)

Plaintiffs brought this litigation alleging that the funding provisions of the Community Schools Act, O.R.C. § 3314 (the "Act"), violate both the state and federal constitutions. Currently before the Court is the Motion to Intervene of White Hat Management, LLC ("White Hat"). (Doc. #9).

I. STANDARD GOVERNING MOTION TO INTERVENE

Under the Federal Rules of Civil Procedure, a non-party to an action may intervene as "of right":

> Upon timely application anyone shall be permitted to intervene in an action... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). Rule 24 also provides the standard for permissive intervention, stating that:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . .In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b).

II. ANALYSIS

A. Intervention as of Right

In this circuit, in order to be entitled to intervene as a matter of right, proposed intervenors must establish four elements: 1) that the motion to intervene was timely; 2) that they have a substantial legal interest in the subject matter of

the case; 3) that their ability to protect that interest may be impaired in the absence of intervention; and 4) that the parties already before the court may not adequately represent their interest. *See Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990).

1. Timeliness

The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances. *See Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir. 1987). The following factors should be considered: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

White Hat's Motion to Intervene was filed nearly five months after the Plaintiffs' Complaint was filed. Shortly after White Hat moved to intervene, the Plaintiffs filed an Amended Complaint. Since then, the Defendants have answered and subsequently filed a motion to dismiss. Little discovery has been conducted, and the Court's ruling on the Defendants' Motion to Dismiss is pending. Neither party to the litigation argues that the motion to intervene was late. Considering the foregoing, White Hat's Motion to Intervene was timely.

2. Substantial Interest

The proposed intervenor must show that they have a substantial interest in the subject matter of this litigation. *See Jansen*, 904 F.2d at 341. The Sixth Circuit subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). For example, an intervenor need not have the same standing necessary to initiate a lawsuit. *See id.*; *Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). The Sixth Circuit has also "cited with approval decisions of other courts 'rejecting the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Miller*, 103 F.3d at 1245 (quoting *Purnell*, 925 F.2d at 948). "The inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Id.* Even if it could be said that the question raised is a close one, "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Miller*, 103 F.3d at 1247.

White Hat does not operate a community school that would be directly impacted by a decision finding the funding provisions of the Act unconstitutional. Instead, White Hat is a management firm whose sole source of income is derived from contracts with community schools. White Hat argues that if the Court were to find the funding provisions of the Act unconstitutional, it would mean the end of community schools and consequently the destruction of its business. Central to its argument is its characterization of the Plaintiffs' Complaint and the Plaintiffs' goal. White Hat argues that the Plaintiffs seek an end to community schools and towards that end seek to have the Act authorizing the schools declared unconstitutional. *See*, Doc. #14 at 1-2. It is apparent that White Hat has misread the Plaintiffs' Complaint.

White Hat believes that the Plaintiffs have asked "that the State be permanently enjoined from providing funds to community schools." *Id.* at 2. However, what the Plaintiffs seek is "a permanent injunction barring defendants from *unconstitutionally* diverting funds from traditional public school districts as is now permitted under [the Act]." Doc. #1 at 29, letter G (emphasis added).[1] Far from seeking the end of community schools in general, the Plaintiffs argue only that the current method of funding and oversight is unconstitutional. White Hat's argument regarding its interest in the subject matter rests on the idea that if the Court were to grant the relief that the Plaintiffs seek, it would mean the end of community schools in Ohio and, by extension, the end of White Hat's solvency. What White Hat has missed is that, even were the Court to grant the relief the Plaintiffs request and find that the current funding scheme is unconstitutional, there is nothing preventing the State from instituting a funding scheme that would pass constitutional muster.

While White Hat's interest in the subject matter is not as immediate as it has argued, it does exist. Although its interest is in the economic consequences of the Court's decision and not in the legal or factual questions at issue, its interest is not insubstantial. As stated, the Sixth Circuit subscribes to a "rather expansive notion of the interest sufficient to invoke intervention of right. . ., [and] close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Miller*, 103 F.3d at 1245-47. While White Hat's interest in the

---

[1] While the Plaintiffs have filed an Amended Complaint, White Hat's Motion to Intervene preceded that pleading. As all of White Hat's arguments are directed at the initial Complaint, for the purposes of ruling on White Hat's Motion to Intervene, the Court will reference the Plaintiffs' original complaint.

subject matter is neither as broad nor as immediate as it suggests, it is sufficient to satisfy this requirement.

3. Impairment

"To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Miller*, 103 F.3d at 1247 (citing *Purnell*, 925 F.2d at 948). Again, White Hat relies on its argument that a ruling in the Plaintiffs' favor would necessarily mean the end of community schools and the end of White Hat as a going concern. The Plaintiffs argue that White Hat has overstated the impact that a ruling in their favor would have. While the Plaintiffs are correct that White Hat's argument does misconstrue their position, and exaggerates the consequences of a ruling favorable to them, White Hat has still demonstrated that it can satisfy the impairment element. To satisfy this element, it is not necessary that the would be intervenor demonstrate that the impairment is probable; they need only demonstrate that such is possible. While there is nothing to indicate that the impairment White Hat sees is likely to result from a ruling in favor of the Plaintiffs, it is one of the *possible* consequences of such a ruling. As the Sixth Circuit has stated, the burden for satisfying this element is minimal, and White Hat has satisfied its burden.

4. Inadequate Representation

Finally, the prospective intervenors must show that the existing defendants may not adequately represent its interests. However, proposed intervenors are "not required to show that the representation will in fact be inadequate." *Miller*, 103 F.3d at 1247. Proposed intervenors are required only to show

that the representation might be inadequate. *See Id.* Indeed, "it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.* The proposed intervenors' burden in showing inadequacy is "minimal." *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10, 30 L. Ed. 2d 686, 92 S. Ct. 630 (1972); *Linton v. Commissioner of Health & Env't.*, 973 F.2d 1311, 1319 (6th Cir. 1992). The proposed intervenors need show only that there is a potential for inadequate representation. *See id.*

White Hat argues that none of the current Defendants shares its economic interest in the outcome of the case, and, therefore, they will not adequately represent its interest. While it is certainly true that none of the Defendants is as economically dependent on the continued existence of community schools as is White Hat, this difference in economic interests is not sufficient to demonstrate the possibility of inadequate representation. Where the proposed intervenor and the defendants seek the same outcome, the fact that there is a difference in interests is not by itself sufficient to demonstrate the possibility of inadequate representation. *See, Jansen*, 904 F.2d at 343. Here, both White Hat and the Defendants seek to have the funding provisions of the Act declared constitutional. White Hat has offered nothing, beyond its collateral, financial interest in the outcome of the case, that would suggest that the current Defendants would fail to represent its interests adequately. While the burden here is minimal, White Hat has offered nothing to satisfy that burden; consequently, it is not entitled to intervention as a matter of right.

While White Hat is not entitled to intervene as a matter of right, it still may be permitted to intervene. Permissive intervention is in the discretion of the Court.

B. Permissive Intervention

Rule 24(b) grants the district court discretionary power to permit intervention if the motion is timely, and if the "applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b)(2). In exercising its discretion, the Court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *Purnell*, 925 F.2d at 951. As noted earlier, the motion to intervene was timely. White Hat's claim that the Act is constitutional presents a question of law common to the main action. *See*, *Miller*, 103 F.3d at 1248. However, while White Hat's intervention will not cause any undue prejudice, it will cause undue and unnecessary delay.

White Hat arguesthat its interest in this litigation is more than that of an interested observer; consequently, it seeks to intervene. The purpose of intervention is to represent its interest in a way that the current Defendants will, or may, not. However, White Hat has failed to identify how the current Defendants will fail to represent its interest adequately. If White Hat is allowed to intervene, it is presumed that it will seek discovery, file motions seeking to dispose of claims it believes are not supported by law or fact, and, in the event this case goes to trial, seek to call and question witnesses and to enter evidence into the record. All of this will require the Plaintiffs and the Court to invest a significant amount of time and effort in response. While White Hat's perspective is different from that of the Defendants, it has offered nothing to indicate that its contribution will add anything of unique value. It argues that, at this stage of the litigation, it is too early to determine what motions it intends to file and what discovery it hopes to conduct However, the Court is comfortable in presuming that

it will file motions, and will seek to conduct discovery. If White Hat were to do otherwise, it would be relegating itself to the role of interested observer, a role that does not require intervention. It has failed to indicate how its unique perspective would impact upon the issues currently before the Court. Allowing it to intervene would result only in the duplication of the efforts of the existing Defendants and undue delay of the litigation. Consequently, the Court will not permit White Hat to intervene.

As a practical matter, the current Defendants have a sufficient interest in the constitutionality of the funding provisions of the Act, that the collateral, financial interests of White Hat will be sufficiently protected.

III. CONCLUSION

White Hat is not entitled to intervene in this action as a matter of right and the Court will not permit it to do permissively. The Motion to Intervene of White Hat Management, LLC (Doc. #9), is OVERRULED.

September 26, 2005

/s/Walter Herbert Rice
WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

OHIO REVISED CODE ANNOTATED
TITLE 33. EDUCATION -- LIBRARIES
CHAPTER 3314. COMMUNITY SCHOOLS

ORC § 3314.08. Annual enrollment reports by school districts and community schools; subtraction from payments to school district; payments to community school; powers of community school; restrictions

(A) As used in this section:

(1) "Base formula amount" means the amount specified as such in a community school's financial plan for a school year pursuant to division (A)(15) of section 3314.03 of the Revised Code.

(2) "Cost-of-doing-business factor" has the same meaning as in section 3317.02 of the Revised Code.

(3) "IEP" means an individualized education program as defined in section 3323.01 of the Revised Code.

(4) "Applicable special education weight" means the multiple specified in section 3317.013 [3317.01.3] of the Revised Code for a handicap described in that section.

(5) "Applicable vocational education weight" means:

(a) For a student enrolled in vocational education programs or classes described in division (A) of section

3317.014 [3317.01.4] of the Revised Code, the multiple specified in that division;

(b) For a student enrolled in vocational education programs or classes described in division (B) of section 3317.014 [3317.01.4] of the Revised Code, the multiple specified in that division.

(6) "Entitled to attend school" means entitled to attend school in a district under section 3313.64 or 3313.65 of the Revised Code.

(7) A community school student is "included in the poverty student count" of a school district if the student is entitled to attend school in the district and the student's family receives assistance under the Ohio works first program.

(8) "Poverty-based assistance reduction factor" means the percentage figure, if any, for reducing the per pupil amount of poverty-based assistance a community school is entitled to receive pursuant to divisions (D)(5) and (6) of this section in any year, as specified in the school's financial plan for the year pursuant to division (A)(15) of section 3314.03 of the Revised Code.

(9) "All-day kindergarten" has the same meaning as in section 3317.029 [3317.02.9] of the Revised Code.

(10) "SF-3 payment" means the sum of the payments to a school district in a fiscal year under divisions (A), (C)(1), (C)(4), (D), (E), and (F) of section 3317.022 [3317.02.2], divisions (G), (L), and (N) of section 3317.024 [3317.02.4], and sections 3317.029 [3317.02.9], 3317.0216 [3317.02.16], 3317.0217 [3317.02.17], 3317.04, 3317.05, 3317.052 [3317.05.2], and 3317.053 [3317.05.3] of the

Revised Code after making the adjustments required by sections 3313.981 [3313.98.1] and 3313.979 [3313.97.9], divisions (B), (C), (D), (E), (K), (L), (M), (N), and (O) of section 3317.023 [3317.02.3], and division (C) of section 3317.20 of the Revised Code.

(B) The state board of education shall adopt rules requiring both of the following:

(1) The board of education of each city, exempted village, and local school district to annually report the number of students entitled to attend school in the district who are enrolled in grades one through twelve in a community school established under this chapter, the number of students entitled to attend school in the district who are enrolled in kindergarten in a community school, the number of those kindergartners who are enrolled in all-day kindergarten in their community school, and for each child, the community school in which the child is enrolled.

(2) The governing authority of each community school established under this chapter to annually report all of the following:

(a) The number of students enrolled in grades one through twelve and the number of students enrolled in kindergarten in the school who are not receiving special education and related services pursuant to an IEP;

(b) The number of enrolled students in grades one through twelve and the number of enrolled students in kindergarten, who are receiving special education and related services pursuant to an IEP;

(c) The number of students reported under division (B)(2)(b) of this section receiving special education and related services pursuant to an IEP for a handicap described in each of divisions (A) to (F) of section 3317.013 [3317.01.3] of the Revised Code;

(d) The full-time equivalent number of students reported under divisions (B)(2)(a) and (b) of this section who are enrolled in vocational education programs or classes described in each of divisions (A) and (B) of section 3317.014 [3317.01.4] of the Revised Code that are provided by the community school;

(e) Twenty per cent of the number of students reported under divisions (B)(2)(a) and (b) of this section who are not reported under division (B)(2)(d) of this section but who are enrolled in vocational education programs or classes described in each of divisions (A) and (B) of section 3317.014 [3317.01.4] of the Revised Code at a joint vocational school district under a contract between the community school and the joint vocational school district and are entitled to attend school in a city, local, or exempted village school district whose territory is part of the territory of the joint vocational district;

(f) The number of enrolled preschool handicapped students receiving special education services in a state-funded unit;

(g) The community school's base formula amount;

(h) For each student, the city, exempted village, or local school district in which the student is entitled to attend school;

(i) Any poverty-based assistance reduction factor that applies to a school year.

(C) From the SF-3 payment made to a city, exempted village, or local school district and, if necessary, from the payment made to the district under sections 321.24 and 323.156 [323.15.6] of the Revised Code, the department of education shall annually subtract the sum of the amounts described in divisions (C)(1) to (9) of this section. However, when deducting payments on behalf of students enrolled in internet- or computer-based community schools, the department shall deduct only those amounts described in divisions (C)(1) and (2) of this section. Furthermore, the aggregate amount deducted under this division shall not exceed the sum of the district's SF-3 payment and its payment under sections 321.24 and 323.156 [323.15.6] of the Revised Code.

(1) An amount equal to the sum of the amounts obtained when, for each community school where the district's students are enrolled, the number of the district's students reported under divisions (B)(2)(a), (b), and (e) of this section who are enrolled in grades one through twelve, and one-half the number of students reported under those divisions who are enrolled in kindergarten, in that community school is multiplied by the greater of the following:

(a) The fiscal year 2005 base formula amount of that community school as adjusted by the school district's fiscal year 2005 cost-of-doing-business factor;

(b) The sum of (the current base formula amount of that community school times the school district's current cost-of-doing-business factor) plus the per pupil amount of the

base funding supplements specified in divisions (C)(1) to (4) of section 3317.012 [3317.01.2] of the Revised Code.

(2) The sum of the amounts calculated under divisions (C)(2)(a) and (b) of this section:

(a) For each of the district's students reported under division (B)(2)(c) of this section as enrolled in a community school in grades one through twelve and receiving special education and related services pursuant to an IEP for a handicap described in section 3317.013 of the Revised Code, the product of the applicable special education weight times the community school's base formula amount;

(b) For each of the district's students reported under division (B)(2)(c) of this section as enrolled in kindergarten in a community school and receiving special education and related services pursuant to an IEP for a handicap described in section 3317.013 [3317.01.3] of the Revised Code, one-half of the amount calculated as prescribed in division (C)(2)(a) of this section.

(3) For each of the district's students reported under division (B)(2)(d) of this section for whom payment is made under division (D)(4) of this section, the amount of that payment;

(4) An amount equal to the sum of the amounts obtained when, for each community school where the district's students are enrolled, the number of the district's students enrolled in that community school who are included in the district's poverty student count is multiplied by the per pupil amount of poverty-based assistance the school district receives that year pursuant to division (B) or (C) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by

any poverty-based assistance reduction factor of that community school. If the district receives poverty-based assistance under division (B) of that section, the per pupil amount of that aid is the quotient of the amount the district received under that division divided by the district's poverty student count, as defined in that section. If the district receives poverty-based assistance under division (C) of section 3317.029 [3317.02.9] of the Revised Code, the per pupil amount of that aid for the district shall be calculated by the department.

(5) An amount equal to the sum of the amounts obtained when, for each community school where the district's students are enrolled, the district's per pupil amount of aid received under division (E) of section 3317.029 of the Revised Code, as adjusted by any poverty-based assistance reduction factor of the community school, is multiplied by the sum of the following:

(a) The number of the district's students reported under division (B)(2)(a) of this section who are enrolled in grades one to three in that community school and who are not receiving special education and related services pursuant to an IEP;

(b) One-half of the district's students who are enrolled in all-day or any other kindergarten class in that community school and who are not receiving special education and related services pursuant to an IEP;

(c) One-half of the district's students who are enrolled in all-day kindergarten in that community school and who are not receiving special education and related services pursuant to an IEP.

The district's per pupil amount of aid under division (E) of section 3317.029 [3317.02.9] of the Revised Code is the quotient of the amount the district received under that division divided by the district's kindergarten through third grade ADM, as defined in that section.

(6) An amount equal to the sum of the amounts obtained when, for each community school where the district's students are enrolled, the district's per pupil amount received under division (F) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by any poverty-based assistance reduction factor of that community school, is multiplied by the number of the district's students enrolled in the community school who are identified as limited-English proficient.

(7) An amount equal to the sum of the amounts obtained when, for each community school where the district's students are enrolled, the district's per pupil amount received under division (G) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by any poverty-based assistance reduction factor of that community school, is multiplied by the sum of the following:

(a) The number of the district's students enrolled in grades one through twelve in that community school;

(b) One-half of the number of the district's students enrolled in kindergarten in that community school.

The district's per pupil amount under division (G) of section 3317.029 [3317.02.9] of the Revised Code is the district's amount per teacher calculated under division (G)(1) or (2) of that section divided by 17, times a multiple of 0.40 in fiscal year 2006 and 0.70 in fiscal year 2007.

(8) An amount equal to the sum of the amounts obtained when, for each community school where the district's students are enrolled, the district's per pupil amount received under divisions (H) and (I) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by any poverty-based assistance reduction factor of that community school, is multiplied by the sum of the following:

(a) The number of the district's students enrolled in grades one through twelve in that community school;

(b) One-half of the number of the district's students enrolled in kindergarten in that community school.

The district's per pupil amount under divisions (H) and (I) of section 3317.029 [3317.02.9] of the Revised Code is the amount calculated under each division divided by the district's formula ADM, as defined in section 3317.02 of the Revised Code.

(9) An amount equal to the per pupil state parity aid funding calculated for the school district under either division (C) or (D) of section 3317.0217 [3317.02.17] of the Revised Code multiplied by the sum of the number of students in grades one through twelve, and one-half of the number of students in kindergarten, who are entitled to attend school in the district and are enrolled in a community school as reported under division (B)(1) of this section.

(D) The department shall annually pay to a community school established under this chapter the sum of the amounts described in divisions (D)(1) to (10) of this section. However, the department shall calculate and pay to each internet- or computer-based community school only the amounts described in divisions (D)(1) to (3) of this section.

Furthermore, the sum of the payments to all community schools under divisions (D)(1), (2), and (4) to (10) of this section for the students entitled to attend school in any particular school district shall not exceed the sum of that district's SF-3 payment and its payment under sections 321.24 and 323.156 [323.15.6] of the Revised Code. If the sum of the payments calculated under those divisions for the students entitled to attend school in a particular school district exceeds the sum of that district's SF-3 payment and its payment under sections 321.24 and 323.156 [323.15.6] of the Revised Code, the department shall calculate and apply a proration factor to the payments to all community schools under those divisions for the students entitled to attend school in that district.

(1) Subject to section 3314.085 [3314.08.5] of the Revised Code, an amount equal to the sum of the amounts obtained when the number of students enrolled in grades one through twelve, plus one-half of the kindergarten students in the school, reported under divisions (B)(2)(a), (b), and (e) of this section who are not receiving special education and related services pursuant to an IEP for a handicap described in section 3317.013 [3317.01.3] of the Revised Code is multiplied by the greater of the following:

(a) The community school's fiscal year 2005 base formula amount, as adjusted by the fiscal year 2005 cost-of-doing-business factor of the school district in which the student is entitled to attend school;

(b) The sum of (the community school's current base formula amount times the current cost-of-doing-business factor of the school district in which the student is entitled to attend school) plus the per pupil amount of the base funding supplements specified in divisions (C)(1) to (4) of section 3317.012 [3317.01.2] of the Revised Code.

(2) Prior to fiscal year 2007, the greater of the amount calculated under division (D)(2)(a) or (b) of this section, and in fiscal year 2007 and thereafter, the amount calculated under division (D)(2)(b) of this section:

(a) The aggregate amount that the department paid to the community school in fiscal year 1999 for students receiving special education and related services pursuant to IEPs, excluding federal funds and state disadvantaged pupil impact aid funds;

(b) The sum of the amounts calculated under divisions (D)(2)(b)(i) and (ii) of this section:

(i) For each student reported under division (B)(2)(c) of this section as enrolled in the school in grades one through twelve and receiving special education and related services pursuant to an IEP for a handicap described in section 3317.013 [3317.01.3] of the Revised Code, the following amount:

> the greater of (the community school's fiscal year 2005 base formula amount X the fiscal year 2005 cost-of-doing-business factor of the district where the student is entitled to attend school) or [(the school's current base formula amount times the current cost-of-doing-business factor of the school district where the student is entitled to attend school) plus the per pupil amount of the base funding supplements specified in divisions (C)(1) to (4) of section 3317.012 [3317.01.2] of the Revised Code] + (the applicable special education weight X the community school's base formula amount);

(ii) For each student reported under division (B)(2)(c) of this section as enrolled in kindergarten and receiving special education and related services pursuant to an IEP for a handicap described in section 3317.013 [3317.01.3] of the Revised Code, one-half of the amount calculated under the formula prescribed in division (D)(2)(b)(i) of this section.

(3) An amount received from federal funds to provide special education and related services to students in the community school, as determined by the superintendent of public instruction.

(4) For each student reported under division (B)(2)(d) of this section as enrolled in vocational education programs or classes that are described in section 3317.014 [3317.01.4] of the Revised Code, are provided by the community school, and are comparable as determined by the superintendent of public instruction to school district vocational education programs and classes eligible for state weighted funding under section 3317.014 [3317.01.4] of the Revised Code, an amount equal to the applicable vocational education weight times the community school's base formula amount times the percentage of time the student spends in the vocational education programs or classes.

(5) An amount equal to the sum of the amounts obtained when, for each school district where the community school's students are entitled to attend school, the number of that district's students enrolled in the community school who are included in the district's poverty student count is multiplied by the per pupil amount of poverty-based assistance that school district receives that year pursuant to division (B) or (C) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by any poverty-based assistance reduction factor

of the community school. The per pupil amount of aid shall be determined as described in division (C)(4) of this section.

(6) An amount equal to the sum of the amounts obtained when, for each school district where the community school's students are entitled to attend school, the district's per pupil amount of aid received under division (E) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by any poverty-based assistance reduction factor of the community school, is multiplied by the sum of the following:

(a) The number of the district's students reported under division (B)(2)(a) of this section who are enrolled in grades one to three in that community school and who are not receiving special education and related services pursuant to an IEP;

(b) One-half of the district's students who are enrolled in all-day or any other kindergarten class in that community school and who are not receiving special education and related services pursuant to an IEP;

(c) One-half of the district's students who are enrolled in all-day kindergarten in that community school and who are not receiving special education and related services pursuant to an IEP.

The district's per pupil amount of aid under division (E) of section 3317.029 [3317.02.9] of the Revised Code shall be determined as described in division (C)(5) of this section.

(7) An amount equal to the sum of the amounts obtained when, for each school district where the community school's students are entitled to attend school, the number of

that district's students enrolled in the community school who are identified as limited-English proficient is multiplied by the district's per pupil amount received under division (F) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by any poverty-based assistance reduction factor of the community school.

(8) An amount equal to the sum of the amounts obtained when, for each school district where the community school's students are entitled to attend school, the district's per pupil amount received under division (G) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by any poverty-based assistance reduction factor of the community school, is multiplied by the sum of the following:

(a) The number of the district's students enrolled in grades one through twelve in that community school;

(b) One-half of the number of the district's students enrolled in kindergarten in that community school.

The district's per pupil amount under division (G) of section 3317.029 [3317.02.9] of the Revised Code shall be determined as described in division (C)(7) of this section.

(9) An amount equal to the sum of the amounts obtained when, for each school district where the community school's students are entitled to attend school, the district's per pupil amount received under divisions (H) and (I) of section 3317.029 [3317.02.9] of the Revised Code, as adjusted by any poverty-based assistance reduction factor of the community school, is multiplied by the sum of the following:

(a) The number of the district's students enrolled in grades one through twelve in that community school;

(b) One-half of the number of the district's students enrolled in kindergarten in that community school.

The district's per pupil amount under divisions (H) and (I) of section 3317.029 [3317.02.9] of the Revised Code shall be determined as described in division (C)(8) of this section.

(10) An amount equal to the sum of the amounts obtained when, for each school district where the community school's students are entitled to attend school, the district's per pupil amount of state parity aid funding calculated under either division (C) or (D) of section 3317.0217 [3317.02.17] of the Revised Code is multiplied by the sum of the number of that district's students enrolled in grades one through twelve, and one-half of the number of that district's students enrolled in kindergarten, in the community school as reported under division (B)(2)(a) and (b) of this section.

(E) (1) If a community school's costs for a fiscal year for a student receiving special education and related services pursuant to an IEP for a handicap described in divisions (B) to (F) of section 3317.013 [3317.01.3] of the Revised Code exceed the threshold catastrophic cost for serving the student as specified in division (C)(3)(b) of section 3317.022 [3317.02.2] of the Revised Code, the school may submit to the superintendent of public instruction documentation, as prescribed by the superintendent, of all its costs for that student. Upon submission of documentation for a student of the type and in the manner prescribed, the department shall pay to the community school an amount equal to the school's

costs for the student in excess of the threshold catastrophic costs.

(2) The community school shall only report under division (E)(1) of this section, and the department shall only pay for, the costs of educational expenses and the related services provided to the student in accordance with the student's individualized education program. Any legal fees, court costs, or other costs associated with any cause of action relating to the student may not be included in the amount.

(F) A community school may apply to the department of education for preschool handicapped or gifted unit funding the school would receive if it were a school district. Upon request of its governing authority, a community school that received unit funding as a school district-operated school before it became a community school shall retain any units awarded to it as a school district-operated school provided the school continues to meet eligibility standards for the unit.

A community school shall be considered a school district and its governing authority shall be considered a board of education for the purpose of applying to any state or federal agency for grants that a school district may receive under federal or state law or any appropriations act of the general assembly. The governing authority of a community school may apply to any private entity for additional funds.

(G) A board of education sponsoring a community school may utilize local funds to make enhancement grants to the school or may agree, either as part of the contract or separately, to provide any specific services to the community school at no cost to the school.

(H) A community school may not levy taxes or issue bonds secured by tax revenues.

(I) No community school shall charge tuition for the enrollment of any student.

(J) (1) (a) A community school may borrow money to pay any necessary and actual expenses of the school in anticipation of the receipt of any portion of the payments to be received by the school pursuant to division (D) of this section. The school may issue notes to evidence such borrowing. The proceeds of the notes shall be used only for the purposes for which the anticipated receipts may be lawfully expended by the school.

(b) A school may also borrow money for a term not to exceed fifteen years for the purpose of acquiring facilities.

(2) Except for any amount guaranteed under section 3318.50 of the Revised Code, the state is not liable for debt incurred by the governing authority of a community school.

(K) For purposes of determining the number of students for which divisions (D)(5) and (6) of this section applies in any school year, a community school may submit to the department of job and family services, no later than the first day of March, a list of the students enrolled in the school. For each student on the list, the community school shall indicate the student's name, address, and date of birth and the school district where the student is entitled to attend school. Upon receipt of a list under this division, the department of job and family services shall determine, for each school district where one or more students on the list is entitled to attend school, the number of students residing in that school district who

were included in the department's report under section 3317.10 of the Revised Code. The department shall make this determination on the basis of information readily available to it. Upon making this determination and no later than ninety days after submission of the list by the community school, the department shall report to the state department of education the number of students on the list who reside in each school district who were included in the department's report under section 3317.10 of the Revised Code. In complying with this division, the department of job and family services shall not report to the state department of education any personally identifiable information on any student.

(L) The department of education shall adjust the amounts subtracted and paid under divisions (C) and (D) of this section to reflect any enrollment of students in community schools for less than the equivalent of a full school year. The state board of education within ninety days after April 8, 2003, shall adopt in accordance with Chapter 119. of the Revised Code rules governing the payments to community schools under this section including initial payments in a school year and adjustments and reductions made in subsequent periodic payments to community schools and corresponding deductions from school district accounts as provided under divisions (C) and (D) of this section. For purposes of this section:

(1) A student shall be considered enrolled in the community school for any portion of the school year the student is participating at a college under Chapter 3365. of the Revised Code.

(2) A student shall be considered to be enrolled in a community school during a school year for the period of time beginning on the later of the date on which the school both has received documentation of the student's enrollment from

a parent and the student has commenced participation in learning opportunities as defined in the contract with the sponsor, or thirty days prior to the date on which the student is entered into the education management information system established under section 3301.0714 [3301.07.14] of the Revised Code. For purposes of applying this division to a community school student, "learning opportunities" shall be defined in the contract, which shall describe both classroom-based and non-classroom-based learning opportunities and shall be in compliance with criteria and documentation requirements for student participation which shall be established by the department. Any student's instruction time in non-classroom-based learning opportunities shall be certified by an employee of the community school. A student's enrollment shall be considered to cease on the date on which any of the following occur:

(a) The community school receives documentation from a parent terminating enrollment of the student.

(b) The community school is provided documentation of a student's enrollment in another public or private school.

(c) The community school ceases to offer learning opportunities to the student pursuant to the terms of the contract with the sponsor or the operation of any provision of this chapter.

(3) A student's percentage of full-time equivalency shall be considered to be the percentage the hours of learning opportunity offered to that student is of nine hundred and twenty hours. However, no internet- or computer-based community school shall be credited for any time a student

spends participating in learning opportunities beyond ten hours within any period of twenty-four consecutive hours.

(M) The department of education shall reduce the amounts paid under division (D) of this section to reflect payments made to colleges under division (B) of section 3365.07 of the Revised Code.

(N) (1) No student shall be considered enrolled in any internet- or computer-based community school or, if applicable to the student, in any community school that is required to provide the student with a computer pursuant to division (C) of section 3314.22 of the Revised Code, unless both of the following conditions are satisfied:

(a) The student possesses or has been provided with all required hardware and software materials and all such materials are operational so that the student is capable of fully participating in the learning opportunities specified in the contract between the school and the school's sponsor as required by division (A)(23) of section 3314.03 of the Revised Code;

(b) The school is in compliance with division (A)(1) or (2) of section 3314.22 of the Revised Code, relative to such student.

(2) In accordance with policies adopted jointly by the superintendent of public instruction and the auditor of state, the department shall reduce the amounts otherwise payable under division (D) of this section to any community school that includes in its program the provision of computer hardware and software materials to any student, if such hardware and software materials have not been delivered, installed, and activated for each such student in a timely

manner or other educational materials or services have not been provided according to the contract between the individual community school and its sponsor.

The superintendent of public instruction and the auditor of state shall jointly establish a method for auditing any community school to which this division pertains to ensure compliance with this section.

The superintendent, auditor of state, and the governor shall jointly make recommendations to the general assembly for legislative changes that may be required to assure fiscal and academic accountability for such schools.

(O) (1) If the department determines that a review of a community school's enrollment is necessary, such review shall be completed and written notice of the findings shall be provided to the governing authority of the community school and its sponsor within ninety days of the end of the community school's fiscal year, unless extended for a period not to exceed thirty additional days for one of the following reasons:

(a) The department and the community school mutually agree to the extension.

(b) Delays in data submission caused by either a community school or its sponsor.

(2) If the review results in a finding that additional funding is owed to the school, such payment shall be made within thirty days of the written notice. If the review results in a finding that the community school owes moneys to the state, the following procedure shall apply:

(a) Within ten business days of the receipt of the notice of findings, the community school may appeal the department's determination to the state board of education or its designee.

(b) The board or its designee shall conduct an informal hearing on the matter within thirty days of receipt of such an appeal and shall issue a decision within fifteen days of the conclusion of the hearing.

(c) If the board has enlisted a designee to conduct the hearing, the designee shall certify its decision to the board. The board may accept the decision of the designee or may reject the decision of the designee and issue its own decision on the matter.

(d) Any decision made by the board under this division is final.

(3) If it is decided that the community school owes moneys to the state, the department shall deduct such amount from the school's future payments in accordance with guidelines issued by the superintendent of public instruction.

(P) The department shall not subtract from a school district's state aid account under division (C) of this section and shall not pay to a community school under division (D) of this section any amount for any of the following:

(1) Any student who has graduated from the twelfth grade of a public or nonpublic high school;

(2) Any student who is not a resident of the state;

(3) Any student who was enrolled in the community school during the previous school year when tests were administered under section 3301.0711 [3301.07.11] of the Revised Code but did not take one or more of the tests required by that section and was not excused pursuant to division (C)(1) or (3) of that section, unless the superintendent of public instruction grants the student a waiver from the requirement to take the test and a parent is not paying tuition for the student pursuant to section 3314.26 of the Revised Code. The superintendent may grant a waiver only for good cause in accordance with rules adopted by the state board of education.

(4) Any student who has attained the age of twenty-two years, except for veterans of the armed services whose attendance was interrupted before completing the recognized twelve-year course of the public schools by reason of induction or enlistment in the armed forces and who apply for enrollment in a community school not later than four years after termination of war or their honorable discharge. If, however, any such veteran elects to enroll in special courses organized for veterans for whom tuition is paid under federal law, or otherwise, the department shall not subtract from a school district's state aid account under division (C) of this section and shall not pay to a community school under division (D) of this section any amount for that veteran.

(2)

No. 06-791

FILED
JAN 0 8 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WHITE HAT MANAGEMENT, LLC,

Petitioner,

v.

BEVERLY BLOUNT-HILL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

FREDERICK G. CLOPPERT, JR.
Counsel for Respondents Beverly Blount-Hill, et al.
CLOPPERT, LATANICK, SAUTER & WASHBURN
225 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 461-4455

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Petitioner is a for-profit education management corporation that operates numerous community schools throughout Ohio. Petitioner was denied intervention in the underlying case which questions the constitutionality of various aspects of the Ohio Community Schools Act. The District Court denied Petitioner's motion to intervene after finding that the Ohio Attorney General adequately represented the Petitioner's interest. The Court of Appeals affirmed the District Court's judgment but found that there was no need to address the adequacy of representation since Petitioner failed to prove that its strictly economic interest satisfied the requirement that a proposed intervenor have a substantial interest in the litigation.

The questions presented are as follows:

Is an entity that was denied intervention by both the Trial Court and the Appellate Court considered a "party" entitled to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1)?

Whether a private company's indirect and strictly economic interest in a lawsuit is sufficient to support intervention as of right under Fed. R. Civ. P. 24(a) when Plaintiffs' Complaint does not challenge any contract to which Petitioner is a party and does not seek to have Petitioner's indirect economic interest eradicated.

PARTIES

A list of all parties to the proceeding in the court whose judgment is under review is as follows:

Petitioner: White Hat Management, LLC.

Respondents: Beverly Blount-Hill; Marcia D. Connors; Willie A. Terrell, President, Dayton Education Association; Board of Education of the State of Ohio; Department of Education of the State of Ohio; and Susan Tave Zelman in her official capacity as Ohio Superintendent of Public Instruction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS OF THE LOWER COURTS	1
JURISDICTION	1
STATUTES, ORDINANCES, AND RULES INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. PETITIONER CANNOT INVOKE THIS COURT'S JURISDICTION UNDER 28 U.S.C. § 1254(1)	5
II. THE RULING BELOW IS NOT IN CONFLICT WITH THE DECISIONS SET FORTH IN WHITE HAT'S PETITION FOR WRIT OF CERTIORARI	6
III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DECISION TO DENY WHITE HAT'S MOTION TO INTERVENE AS A MATTER OF RIGHT	10
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Bayard v. Lombard, 50 U.S. 530 (U.S.Pa. Jan. Term 1850). 5

Ex parte Cockcroft, 104 U.S. 578 (1881) 5

Ex parte Cutting, 94 U.S. 15 (1876) 6

Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co., 109 U.S. 168 (1883) 5

Maine v. Taylor, 477 U.S. 131 (1986) 5

New York Public Interest Group, Inc. v. Regents of the University of N.Y., 516 F.2d 350 (2d Cir. 1975) 8

Providence Baptist Church v. Hillandale Comm. Ltd., 425 F.3d 309 (6th Cir. 2005) 10

United States v. Alisal Water Corp., 370 F.3d 915 (9th Cir. 2004) 9

Utahns for Better Transp. v. U.S. DOT, 295 F.3d 1111 (10th Cir. 2002) 8, 9

LEGISLATIVE MATERIAL

28 U.S.C. § 1254(1) 1, 2, 4, 5, 6

Ohio Revised Code § 3314.08 ..... 1, 10

MISCELLANEOUS

Federal Rule of Civil Procedure 24(a) 1, 2, 7, 10

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS OF THE LOWER COURTS

The District Court's order overruling Petitioner's motion to intervene is unreported and reprinted in the Appendix to White Hat's Petition for Certiorari ("Pet. App.") at 19a-27a. The opinion of the Sixth Circuit Court of Appeals is unreported and reprinted at Pet. App. 1a-18a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 5, 2006. Petitioner is attempting to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, ORDINANCES AND RULES INVOLVED

Rule 24(a)(2) of the Federal Rules of Civil Procedure reads as follows:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Ohio Revised Code §3314.08 sets forth the methodology for state formula aid funding for community school students. Pet. App. 28a-50a.

28 U.S.C. § 1254 reads: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . "

STATEMENT OF THE CASE

The District Court denied Petitioner's Motion to Intervene as a matter of right on the basis that Petitioner had failed to prove that its interests would not be adequately represented by the Ohio Attorney General, who was defending the named Defendants. Pet. App. 19a-27a. The Court of Appeals affirmed the District Court's judgment but found that there was no need to address or otherwise determine whether Petitioner satisfies the fourth element of a Rule 24(a)(2) inquiry, adequacy of representation, since Petitioner failed to satisfy the second element, which requires a substantial interest in the litigation. Pet. App. 1a-18a.

Petitioner claimed throughout the proceedings in the lower Courts, and again in its Petition for Writ of Certiorari, that should Plaintiffs prevail, Petitioner would cease to exist. As acknowledged by both lower Courts, Petitioner overstates the reach of Plaintiffs' Complaint. In their Complaint Plaintiffs simply seek to have the state formula aid afforded to community school students equal the state aid received and retained by the traditional public school districts for each of its students. Contrary to Petitioner's argument, Plaintiffs do not seek to have funding to community schools terminated, but rather, to have these students, along with traditional public school students,

receive state funding in a constitutional manner. If Plaintiffs were to obtain their desired outcome, funding to community school students, and thus, Petitioner, would not be reduced in any way. Instead, state formula aid funding to traditional public school district students would be increased so that the amount the traditional public school districts retained in state formula aid funding for each traditional student, after the community school deduction is subtracted, would match the amount of state formula aid funding received by each community school students. Therefore, contrary to Petitioner's assertions, its "very survival" is in no way threatened by this litigation.

Factual Background. White Hat is a for-profit education management corporation that enters into contracts with community schools to provide management services for such schools. White Hat usually receives approximately 97% of the state public funds that the community school receives.

The concept of community schools in Ohio was touted as presenting a unique alternative in public education that would exempt these schools from many statutory requirements in exchange for greater accountability. It was thought that the competition between community schools and traditional schools would raise academic results. Unfortunately, to date the vast majority of these community schools are significantly failing in their promise to achieve greater academic results. In fact, most of these schools have not even achieved the same level of academic progress as traditional public schools.

A suit challenging certain aspects of the constitutionality of the Community Schools statute and the State's implementation and oversight of these schools was

brought in two separate and unrelated state court cases. White Hat was permitted to intervene in these cases because there were specific allegations raised against the contracts to which White Hat was a party. There are no such similar allegations in the present case and therefore, the fact that White Hat was permitted to intervene in those cases has no bearing on whether White Hat should be permitted in the present case.

White Hat seeks to intervene in the present case for the sole purpose of trying to protect the substantial profit it realizes from managing these state funded community schools. It is this strictly economic interest that Petitioner claims affords it a right to intervene.

SUMMARY OF ARGUMENT

Petitioner was denied the right to intervene by both the Trial Court and the Appellate Court. As a result, Petitioner is not a "party" to the underlying lawsuit and therefore, cannot invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

Even should this Court find that its jurisdiction was properly invoked, White Hat's Petition for Writ of Certiorari should be denied. Plaintiffs-Respondents do not seek to "eliminate the funding for all community schools" as repeatedly alleged by Petitioner. Plaintiffs' position is that the current formula for funding community schools is unconstitutional, and seek to have the State devise a constitutional funding method.

Despite Petitioner's assertion otherwise, all of the cases cited by Petitioner that supposedly indicate a conflict

between the Sixth Circuit's decision and other Districts are easily distinguished from the case at bar. When read carefully, these cases are not at variance and do not require this Court's review.

None of the contracts to which White Hat is a party are challenged in the present case. Thus, White Hat does not have a direct interest in the litigation. Any peripheral interest that White Hat may have in the funding levels of community schools is indirect, strictly economic, and does not rise to the level of a substantial legal interest that would warrant intervention as of right. Further, any interest that White Hat may have is adequately represented by the Ohio Attorney General, who has a duty to zealously represent the State and defend the statute at issue.

ARGUMENT

I. PETITIONER CANNOT INVOKE THIS COURT'S JURISDICTION UNDER 28 U.S.C. § 1254(1).

28 U.S.C. § 1254 reads, with emphasis added, that "Cases in the courts of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition **of any party** . . . " Statutes authorizing appeals as of right to Supreme Court are strictly construed. *Maine v. Taylor*, 477 U.S. 131 (1986).

It has long been the rule that a person or entity who is not a party is not entitled to appeal from a decision. *Bayard v. Lombard*, 50 U.S. 530 (U.S.Pa. Jan. Term 1850); *Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.*, 109 U.S. 168 (1883); *Ex parte Cockcroft*, 104 U.S. 578 (1881). When a lower Court refuses to permit the movers to

intervene and become parties to the record, the decision is not susceptible of being reviewed by this court on appeal. *Ex parte Cutting*, 94 U.S. 15 (1876).

In this situation, Petitioner White Hat was denied intervention by both the Trial Court and the Appellate Court. Therefore, White Hat is not a "party" to the action and cannot invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

II. THE RULING BELOW IS NOT IN CONFLICT WITH THE DECISIONS SET FORTH IN WHITE HAT'S PETITION FOR WRIT OF CERTIORARI

In their Complaint, Plaintiffs do not challenge the contracts between the community schools and Petitioner White Hat. Instead, Plaintiffs' Complaint questions the funding mechanism codified in the Ohio Community Schools Act, the racial targeting of the placement of community schools, and the inability of the citizens of a school district to elect the number of members and organization of community school governing authorities.

Plaintiffs-Respondents do not seek to eliminate state formula aid funding to community schools, but simply seek to have a funding methodology devised for both community school and traditional public school students that complies with the U.S. Constitution. Ideally, Plaintiffs would like to see traditional public school district students receive and retain the same amount of state formula aid funds, per student, that community school students currently receive. Such an outcome would in no way whatsoever effect Petitioner's economic interest.

However, White Hat claimed at both the District Court and the Appellate Court levels that Respondent's Complaint seeks to prevent community schools from operating by declaring the Act unconstitutional. For this reason, White Hat claims it should be permitted to intervene as a matter of right. Fed. R. Civ. Pro. 24(a). Both the Trial Court and the Appellate Court found that Petitioner's argument was without merit and overstated the possible effect that Plaintiffs-Respondents' Complaint may have on Petitioner.

Nevertheless, Petitioner once again makes this same misstatement in their Petition for Writ of Certiorari. In fact, at least eleven times[1] in the Petition White Hat once

---

[1] "[T]he Sixth Circuit denied White Hat Due Process to defend its very survival." Petition for Writ ("Petition") at 2.

"Plaintiffs seek to eliminate funding for all Ohio community schools." Petition at 3.

"White Hat's viability is at risk." Petition at 3.

" . . . if the Court granted the relief sought by the Plaintiffs, it would effectively end community schools in Ohio and, consequently, the solvency of White Hat's Ohio operations." Petition at 4.

" . . . should the Plaintiffs prevail, White Hat's business in Ohio will be extinguished." Petition at 9.

" . . . White Hat's business would not just be impaired, it would be extinguished in Ohio." Petition at 12.

" . . . White Hat's . . . very survival in Ohio depends on the outcome of the underlying litigation." Petition at 13.

"Here, the state funding source for community schools will be eliminated, not simply limited, if the Act is found to be unconstitutional." Petition at 14.

" . . . this lawsuit that is aimed at eliminating community schools in Ohio." Petition at 14.

" . . . a constitutional contest which could extinguish its business in Ohio." Petition at 15.

(Continued on following page)

again raises and tries to rely on this tiresome and melodramatic argument. This is a patently inaccurate categorization of Plaintiffs' lawsuit that is repeatedly made by Petitioner is an attempt to justify intervention.

Contrary to Petitioner's argument, the case of *New York Public Interest Group, Inc. v. Regents of the University of N.Y.*, 516 F.2d 350 (2d Cir. 1975) is not in conflict with the Appellate Court's decision in this case. In *New York*, the Regents admitted that the purpose of the statute in question was to protect the interests of some pharmacists at the possible expense of other pharmacists. *Id.* at 352. In the present case, Respondents do not seek to protect some for-profit management companies at the expense of the Petitioner. Further, in the *New York* case the pharmacists attempting to intervene not only had an economic interest in the litigation, but a professional interest as well. *Id.* at 352. In the case at bar, as evidenced by the manner in which Petitioner phrased the question presented for review, "interest is strictly economic in nature," Petitioner herein only has an economic interest. For the reasons set forth above, the *New York* case is easily distinguishable and not in conflict with the Sixth Circuit's decision.

Petitioner next argues that the Tenth Circuit's decision in *Utahns for Better Transp. v. U.S. DOT*, 295 F.3d 1111 (10th Cir. 2002) is in conflict with the Sixth Circuit Appellate decision in the present case. Again, a careful reading of the *Utahns* decision proves otherwise. In *Utahns*, the Plaintiff sought an order vacating all contracts to which

---

" . . . economic rights are threatened by litigation in which the litigants seek to silence and destroy nonparties." Petition at 15.

the proposed intervenors were a party. *Id.* at 1112-13. In the present case, Plaintiffs-Respondents have not requested that any contract to which White Hat is a party be terminated or otherwise revised. Thus, the Tenth Circuit's decision in *Utahns* is clearly distinguishable from the present case.

Next, Petitioner argues that the Ninth Circuit's decision in *United States v. Alisal Water Corp.*, 370 F.3d 915 (9th Cir. 2004) is in conflict with the Appellate Court's decision in this case. Once again, this is not true and the Petitioner grossly misquotes the *Alisal* Court's holding. Petitioner claims that while denying intervention, the *Alisal* Court held that "an economic interest *would be* sufficient if concrete and related to the subject matter of the action." Petition for Writ at p. 9.[2] (emphasis added). However Petitioner's representation to this Court of the *Alisal* Court's holding left out at least two important words ("non-speculative" and "underlying") and completely changed a key word to its advantage ("would" rather than "may"). At page 919 the *Alisal* court actually found, with emphasis added, that "a *non-speculative* economic interest *may be* sufficient to support a right of intervention" but the "economic interest must be concrete and related to the *underlying* subject matter of the action."

In the case at bar, any strictly economic interest White Hat may have had is purely speculative since

[2] The Petitioner cited page 920 of the *Alisal* decision for this proposition. However, a review of page 920 does not reveal any such passage. The only reference found on page 920 occurs when the Court explained that " . . . regardless of the phase of litigation at which an interest arises, that interest must be related to the underlying subject matter of the litigation."

Plaintiffs' complaint does not seek to have the funding to community schools reduced. Further, the underlying subject matter of Plaintiffs' Complaint is the constitutionality of the methodology with which the State distributes state foundation formula aid. Petitioner White Hat enters into contracts with the community schools, not the State, and receives its funding from the community school, not the State. Ohio Rev. Code § 3314.08. Thus, Petitioner's interest is not related to the underlying subject matter of the action.

III. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DECISION TO DENY WHITE HAT'S MOTION TO INTERVENE AS A MATTER OF RIGHT.

Petitioner maintains that the Sixth Circuit decision created a "bright-line rule" that "an economic interest is never sufficient to intervene under Rule 24(a)." This is an incorrect summation of the Sixth Circuit's finding. In actuality, the Sixth Circuit cited *Providence Baptist Church v. Hillandale Comm. Ltd.*, 425 F.3d 309, 315 (6th Cir. 2005), and agreed that a proposed intervenor need not have standing to intervene. Moreover, the Appellate Court considered and placed emphasis on the fact that in this case, White Hat "is not a party to any challenged contract nor is it directly targeted by Plaintiff's Complaint."

Thus, the Sixth Circuit's decision indicates that all relevant facts should be taken into consideration and even if a proposed intervenor does not have standing, it may still be permitted to intervene when the Complaint directly targets the intervenor or when the intervenor is a party to a challenged contract. Since Plaintiffs-Respondents do not target White Hat or any other management company, or challenge any contract to which

White Hat is a party, the Sixth Circuit properly considered all the attendant individual circumstances and was correct in denying White Hat's Motion to intervene as a matter of right.

CONCLUSION

Based upon all of the above, there is no conflict between the decisions cited by Petitioner's and the Sixth Circuit's opinion in the present case. Accordingly, there is no need for this court to grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

FREDERICK G. CLOPPERT, JR.
(0010371)
U.S. Supreme Court Counsel for Respondents Beverly Blount-Hill, et al.
CLOPPERT, LATANICK, SAUTER & WASHBURN
225 East Broad Street
Columbus, Ohio 43215
Telephone: (614) 461-4455